This is the judgment of the apeals court of the sixth Circuit which covers University of Akron.

98-3253

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Leonard Gree, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABDUL AZIZ
Plaintiff-Appellant,

v.

THE UNIVERSITY OF AKRON
Defendant-Appellee.

Before: SILER, DAUGHTREY, and GILMAN, Circuit Judges.

This pro se Ohio litigant appeals a district court judgement dismissing his complaint filed pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C § 2000e (Title VII), and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C § 621 (ADEA). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary damages, after receiving Equal Employment Opportunity Commission right to sue letter, Abdul Aziz sued the University of Akron claiming that the University did not hire him for a teaching position: 1) because of his age, in violation of the ADEA; 2) because of his race,

in violation of the Title VII; and 3) because of his national origin, in violation of Title VII.

The district court granted the defendant's motion for summary judgement and dismissed the complaint. Aziz appeals that judgement.

This court reviews de novo a district court's grant of summary judgement. *See Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988). Summary judgement is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgement as a matter of law. Fed. R. Civ. P. 56(c); Avery v. King, 110 F.3d 12, 13-14 (6th Cir. 1997). The moving party is entitled to judgement as a matter of law where, after adequate time for discovery, the nonmoving party fails to establish the existence of an element essential to its case and on which that party would bear the burden at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Where, as here, the plaintiff fails to present direct evidence of discrimination, the courts analyze ADEA cases under the three-step *McDonnell Douglas* framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 802 (1973); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 342-43 (6th Cir. 1997)l *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 1081 (6th Cir. 1994). Initially, the plaintiff must present evidence sufficient to establish a prima facie case of age discrimination. *See Barnhart v. Pickrel, Schaeffer & Eberling Co.*, L.P.A., 12 F.3d 1382, 1389 (6th Cir. 1993). Under the *McDonnell Douglas* framework, a plaintiff first must establish a prima facie case by showing that: 1) he was at least 40 years old at the time of the alleged discrimination; 2) he was subjected to an adverse employment action; 3) he was otherwise qualified for the position; and 4) the successful applicant was substantially

younger than the plaintiff. *See Barnett v. Department of Veterans Affairs*, 153 F.3d 338, 341 (6th Cir 1998), *petition for cert. filed*, (Nov. 25 1998) (No. 98-922). If the plaintiff establishes a prima facie case, the burden of production them shifts to the defendant to produce evidence of a nondiscriminatory reason for its action. *See id.* If the defendant can come forth with such a reason, the burden returns to the plaintiff to demonstrate that the defendant's proffered reason is pretextual. See id.

Similarly, in order to prevail under Title VII, Aziz must first establish a prima facie case of discrimination, which requires that he prove that: 1) he is a member of a protected class; 2) an adverse employment decision was made against him; 3) he was otherwise qualified for the position from which the adverse decision arose; and 4) the successful applicant was not a person of his protected class. *See Ensley-Gaines v. Runyon*, 100 F.3d 122, 1224 (6th Cir. 1996); *cf. Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981); *McDonnell Douglas*, 411 U.S. at 802. Once the prima facie elements have been establish, the defendant must produce evidence that a legitimate nondiscriminatory reason motivated the employment action.McDonnell Douglas, 411 U.S. at 802. The burden of production then returns to the plaintiff to demonstrate that the reason proffered by the defendant was pretextual. *See Texas Dep't of Community Affairs*, 450 U.S at 252-53; *Goostree v. Tennessee*, 796 F.2d 854, 861-63 (6th Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

Upon review, we conclude that even if Aziz had established a prima facie case of discrimination on any or all his three theories, the University met its burden of showing legitimate, non-discriminatory reasons for not hiring him. The University convened a search committee which established numerical values for professional qualifications that it deemed

necessary and preferable. The committee reviewed the resumes of fifty-six applicants, assigned points according to the prescribed criteria, and interviewed the top thirteen applicants by phone. Aziz was one of the applicants interviewed by phone, but he was not among the five finalists offered on-campus interview because the search committee had concerns about errors in his cover letter, frequent job changes, the lack of dates in his resume which indicated lapses between jobs, and the lack of any recent industrial experience.

The search committee deemed Aziz's lack of any industrial or teaching experience for the previous five years particularly detrimental. An employer may legitimately consider recent experience as a major factor in evaluating candidates. *See Shipkovitz v. Board of Trustees of Univ. of District of Columbia,* 914 F. Supp. 1, 3 (D.D.C. 1996), aff'd 124 F.3d 1309 (D.C. Cir 1997). In addition, Aziz did not possess a professional engineer's license. An employer is entitled to establish its own preferred qualifications. *See Hassan v. Auburn University,* 833 F. Supp. 866, 872 (M.D. Ala. 1993), aff'd 15 F.3d 1097 (11th Cir. 1994). Thus, the University met its burden of showing that it did not hire Aziz because that he was less qualified than five finalists, or the successful candidate. No discrimination exists where an employer chooses a candidate it believes is more suitable to its needs. *See Texas Dep't of Community Affairs,* 450 U.S at 259. Interestingly, Aziz admitted in his deposition that the University did not even know his race, national origin or age at the time he was eliminated from the hiring process.

In light of the forgoing evidence, Aziz was required, yet failed, to produce significant probative evidence showing that the reasons proffered by the University for not hiring him were pretextual. *See id.* at 252-53. Thus, he failed to establish the existence of an element essential to his case on which he would bear the burden at trial, *see Celotex Corp. v. Catrett,*

477 U.S. at 322-23, and summary judgement was properly granted to the defendant.

Accordingly, the district court's judgement is hereby affirmed pursuant to Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Sd/- Leonard Green
Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ABDUL AZIZ	)	CASE NO. 5:97 CV 1907
PLAINTIFF	)	JUDGE PETER ECONOMUS
	)	
v.	)	MEMORANDUM OPINION
	)	AND ORDER
	)	
THE UNIVERSITY	)	
OF AKRON	)	
	)	
DEFENDANT	)	

1. This matter is before the Court upon Defendant's Motion for Summary Judgement (Dkt. #19). For the reasons set forth below, the Court finds Defendant's motion to be meritorious.

2. Plaintiff's Complaint states trhree claims for relief based on Plaintiff's unsuccessful application for a teaching position at the University of Akron in August, 1996: age discrimination in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 et. Seq. (the "ADEA"), and race and national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C § 2000e, et. Seq. ("Title VII").

3. In 1996, Defendant began the selection process for the position of Assistant Professor of Mechanical Engineering Technology. As part of the search, Defendant executed a plan to ensure a diverse applicant pool for the position and a fair evaluation of that pool.

4. Before the search committee selected thirteen semi-finalists, it met and decided the appropriate weight of hiring criteria, including minimum preferred qualifications for the position. To facilitate its evaluation of the applications, the committee used a form which incorporated assigned weights to the preferred qualifications. When the applicants forwarded their resumes in response to the advertisement, they were asked to complete an application form on which the applicants were to list, inter alia, their teaching and industrial experience for the past five years. Each committee member then reviewed the completed application forms and used them to assign points to each applicant.

5. Plaintiff received a telephone interview and acknowledged that no discriminatory statements were made nor was any discriminatory information elicited during this interview.

6. After his telephone interview, Plaintiff was not included in the on-campus interviews and eliminated from the process because members of the search committee had concerns about errors in Plaintiff's cover letter. Plaintiff's frequent job changes, the lack of dates in his resume which suggested he may be hiding lapses between jobs, and the fact that Plaintiff did not have recent industrial experience. Furthermore, Plaintiff's application revealed that he had no industrial or teaching experience for the previous five years, and that he lacked the professional engineer's license. Because of these considerations, Plaintiff received a low ranking.

7. According to the Defendant, Plaintiff's industrial and teaching experience was stale and his resume revealed that he had trouble maintaining long-term employment. Plaintiff's age, race, and national origin did not factor into Defendant's hiring decision.

Fed. R. Civ. P. 56(c) governs summary judgement and provides in pertinent part:

The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving part is entitled to a judgement as a matter of law.

8. The party moving for summary judgement bears the burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the evidence submitted must be viewed in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. Adickęs v. S.H. Kress & Co., 398 U.S. 144 (1970).

9. "The burden on the moving party may be discharged if the moving party demonstrates that the non-moving party has failed to establish an essential element of his or her case for which he or she bears the ultimate burden of proof at trial." Morales v. American Honda motor Co. Inc., 71 f.3d 531, 535 (1995). If the moving party meets this burden then the non-moving party must present additional evidence beyond the pleadings. Id. The non-moving party must present more than a scintilla of evidence I support of his or her position. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Summary judgement must be granted unless there is sufficient evidence favoring the non-moving party for a judge or jury to return a verdict for that party. Id at 249.

10. Lacking the direct evidence of discrimination based on his protected characteristics, Plaintiff bears the burden of establishing a prima facie case under the McDonnell Douglas paradigm. Thus, for his failure to hire claims to survive

summary judgement, Plaintiff must establish all of the following elements of a prima facie case of discrimination:

1. that he belonged to a protected class;
2. that he applied for and was considered for a position for which he was qualified;
3. that he was not hired; and
4. that another person who was not a member of his protected class was given the position.

Creech v. Ohio Cas. Ins. Co., 944 F.Supp. 1347 (S.D.Ohio 1996) citing Brown v. Tennessee. 693 F.2d 600, 603 (6th Cir. 1982).

Furthermore,

Merely making our a prima facie case does not automatically save [plaintiff] from a summary judgement motion. "Indeed, the inference of discrimination created by the prima facie case is dispelled once the employer's [legitimate, nondiscriminatory] reason is stated, until and unless the latter is shown to be a pretext."

Gagne v. Northwestern Nat. Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989) quoting Menard v. First Security Serv. Corp., 848 F.2d 281, 287 (1st Cir. 1988).

11. Assuming arguendo, that Plaintiff is able to establish a prima facie case of discrimination on any or all of his three theories, his claims cannot withstand summary judgement. Defendant set forth a legitimate, nondiscriminatory reason for not hiring Plaintiff. Defendant simply selected a candidate it believed was more qualified and better able to meet its current needs. Regardless of Plaintiff's membership in any protected class, no discrimination exists where the employer

chooses the candidate it believes is more suitable to its needs. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259, 101 S.Ct. 1089, 1097, 67 L.Ed.2d 207 (1981).
12. While Plaintiff may disagree with the relative weight Defendant gave the stated qualifications or even how Defendant defines its preferred qualifications, such a disagreement is not a legitimate basis for a discrimination claim. Even if Plaintiff feels Defendant made a mistake, Defendant is entitled to base its employment decision on "a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, so long as it is not a discriminatory reason." Brown v. American Honda Motor Co., 939 F.2d 946,951 (11th Cir. 1991).

13. In this case, Defendant afforded greater weight to the timing of the candidates' experience. An employer may legitimately consider recent experience as a major factor in evaluating candidates. Shipkovitz v. Bd. Of Trustees of Univ. Of Dist. Col., 914 F.Supp. 1, 3 (D.D.C. 1996), aff'd 125 F.3d 1309 (D.C. Cir. 1997). Furthermore, Defendant determined that the candidate they chose was more qualified than Plaintiff in part because he was a licenses professional engineer, one of the advertised "preferred" qualifications and his resume did not reflect the employment instability. These considerations, and the others utilized by Defendant in maing its hiring decision, are obviously both nondiscriminatory and legitimate business decisions. See Matthews v. Kilroy, 117 F.3d 1420, 1907 WL377013 **4 (6th Cir. 1997)l see also Cesaro v. Lakeville Community School District, 953 F.2d, 252, 255 (6th Cir. 1991).

14. Defendant has met its burden of production by articulating a legitimate nondiscriminatory reason for not selecting Plaintiff for the position. According to the McDonnell Douglas framework, Plaintiff bears the burden of

persuasion to show there is a genuine issue as to whether or not the reasons proffered by Defendant are pretextual. However, Plaintiff has not produced any evidence of pretext.

15. Based on Defendant's legitimate nondiscriminatory reasons for not hiring Plaintiff and the absence of any evidence indicating that the articulated reasons are pretextual. Defendant's motion for Summary Judgement (Dkt. #19) is GRANTED

IT IS SO ORDERED.

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PETER C. ECONOMUS

UNITED STATES DISTRICT JUDGE

saint martin's college

5300 Pacific Avenue S.E Lacey, Washington 98505-1297
Telephone (206) 491-4700. FAX 206)459-4124

March 24, 1995

Adul Aziz, Ph.D.
922 Edmonston Road
Greenbelt, MD 20770-1504

Dear Dr. Aziz:

Thank you for your interest in the Assistant/Associate Professor of Mechanical Engineering position at Saint Martin's College.

To date, we have received the following materials:

/ x / Application Letter / x / Resume

/ x / Transcripts / x / 3 Letters of recommendations

Your file is complete and eligible for review. A description for the position is enclosed for your information. Applicants will be notified for interviews approximately one to two weeks after the position closes.

Again thank you for your interest in teaching at Saint Martin's.

Sincerely yours,

Richard Langhill, Ph. D.
Vice President for Academic Affairs

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ABDUL AZIZ

VS. NO. LR-C-96-843

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK
DEFENDANT

ORDER

Pending before the Court is plaintiff's pro se motion for Summary Judgement in the above styled case. Plaintiff's complaint alleges that he was not hired for a faculty position at the University of Arkansas at Little Rock (UALR) in violation of the Age Discrimination in Employment Act (ADEA), and in violation of Title VII based on race and national origin.

In his motion for Summary Judgement, plaintiff asks the Court to hold that a less qualified person was selected for the UALR faculty position. Plaintiff's request requires the Court to make a factual decision on a genuine issue of material fact which is precluded pursuant to Federal Rule of Civil Procedure 56.

Plaintiff's Motion for Summary Judgement (#10) is denied.

James M. Moody

United States District Judge